Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILBERT CORLEY,

Petitioner,

v.

THE CITY OF LONGVIEW, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When he works alone at night, in a dangerous area, petitioner has a pistol. He is fired. He asks for a post-termination hearing before Longview's Grievance Committee. It has subpoena powers. Petitioner has none. He asks other employees, who likewise bear arms, to voluntarily appear before the committee. They refuse. Petitioner's timely request, to subpoena these employees for testimony, is rejected. Is petitioner denied due process, equal protection of law, and compulsory process by an administrative body, and the lower courts, in violation of the 5th, 6th and 14th Amendments to the U.S. Constitution?

2. The other arms bearing employees, who are of different races and sexes than Wilbert Corley, remain in Longview's employment. Does the City of Longview violate petitioner's federally protected employment rights?

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All opinions are in the appendix. They are by a magistrate judge of the United States District Court for the Eastern District of Texas at Tyler and a three judge panel of the United States Court of Appeals for the Fifth Circuit. None are published.

JURISDICTION

This is a review of the final judgment of the District Court dated October 15, 1998. Notice of appeal is timely filed October 22, 1998. On May 4, 1999, the Court of Appeals affirms the judgment of the District Court. The Supreme Court has jurisdiction of this case pursuant to 28 U.S.C.A. §§ 1254(1) and 1257(a).

CONSTITUTIONAL PROVISIONS

Nor be deprived of life, liberty, or property, without due process of law. 5th Amendment, United States Constitution.

To have compulsory process for obtaining witnesses in his favor. 6th Amendment, United States Constitution.

Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. 14th Amendment, United States Constitution.

STATEMENT OF THE CASE

The District Court's jurisdiction is pursuant to 28 U.S.C.A. § 1331. Court of Appeals jurisdiction is conferred by 28 U.S.C.A. §§ 1291 and 2106.

An exhibit, a security survey of the Cherokee Water Treatment Plant, has the following information about the plant. (Vol. 1 pgs 189-192). Its operators work nights alone, and they walk the entire 13 acre facility at least twice nightly. Sometimes operators are required to walk 600-800 yards a trip. (Vol. 1 p 197, p 206, p 207, p 101 p 102). The plant is badly lighted at night. Operators have to lock and unlock two gates with padlocks and chains. Unlocking these gates, chains and padlocks costs precious time to someone who tries to aid an injured employee, or one being attacked. If an operator is attacked, it is very difficult to take out, open a cell phone, and dial for help. (Vol. 1 p 190). Intruders have easy access to the plant, and there are many structures for them to hide behind. Intruders use adjacent trees to go over the fence, and hobos cut the fence to get water. There are cuts in the fence and many top barbed wire strands are down. The Biker Club "Moms" is located at the Southeast corner of the fenced area, and its patrons are outside at night. These people are close to a pump house that has to be checked twice a night. Operators feel unsafe, and especially females. (Vol. 1 p 190, p 191). A man squeezes through the fence at night, and a female operator calls 911.

City supervisors read the survey. They know hobos are camped outside the plant, and they realize "Moms" is

there. A supervisor, Mike Brown, acknowledges the operators complain safety must be improved at the plant. (Vol. 1 p 210, p 212).

Petitioner, Wilbert Corley, a white male, is a water treatment operator on the 11 p.m. to 7 a.m. shift at the Cherokee Water Treatment Plant. He is the only employee at work. He calls another plant every two hours. (Vol. 1 p 196, p 198).

Corley confirms the plant survey is accurate. Corley feels working alone, during the night at the plant, jeopardizes his personal safety. (Vol. 1 p 196, p 197). Corley encounters trespassers who, late at night, walk into his office. Some of them fish in the reservoir. (Vol. 1 p 197, p 198, p 201). Despite numerous recommendations to improve safety, Longview only places three large lights on perimeter poles. (Vol. 1 pgs 187-188, pgs 191-192, p 197).

At the plant, Wilbert Corley sees fellow employee, Trena Nelson, a white female, with her gun. And Trena says, in Corley's presence, "Don't sneak up on me at night because I'm packing." (Vol. 1 p 198, p 203). Other employees, John Pickron, a black male, and Cindy Beasley, a white female, tell Corley they have arms at the Cherokee plant. (Vol. 1 p 202).[1] And these other

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[1] Federal Rule of Evidence 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when a party intentionally causes the unavailability of the declarant. This rule applies to all parties, including the government. *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984).

employees work alone and encounter trespassers. The employees arm themselves for self-protection. (Vol. 1 p 198, p 203). John Pickron admits discussing guns with Corley at the plant. Pickron does not report this discussion to anyone. (Vol. 1 p 219 Pickron Deposition). When an employee tells Ron Welch that he (the employee) has a weapon at the plant, Supervisor Welch says, "I don't want to hear it." Welch makes this statement after a "No Handguns Permitted" sign is posted at the Cherokee plant. (Vol. 1 p 198).

Wilbert Corley has a handgun at the plant. When he leaves work, the pistol is on top of his desk. (Vol. 1 p 174, p 200).

Corley is interviewed, and he admits he owns the noticed gun. He is placed on administrative leave and told to contact his supervisor, Mike Brown, who recommends Corley's termination. Corley is directed to see Ed Rohner, Director of Public Service, and he is given information on how to file a grievance. On July 29, 1997, Rohner gives Corley a pre-termination hearing. Corley tells him other employees have guns at the plant. On July 30, 1997, Rohner terminates Corley. On August 4, 1997, Corley notifies Longview employees that he invokes Step 3 of the employment grievance process, which allows a post-termination hearing before three city employees selected by the City Manager. On August 6, 1997, Corley completes and delivers his grievance form to city employees. (Vol. 1 pgs 174-185). On August 13, 1997, Corley requests the City provide employees Trena Nelson, Cindy Beasley and John Pickron to testify at his hearing, which is before the Grievance Committee on

August 21, 1997. Kay Wilkinson, Human Resources Division Manager, receives this request by fax on August 13, 1997, and by mail on August 14, 1997. She serves as the coordinator of this hearing. (Vol. 1 p 173).

On October 26, 1984, in a memorandum to Longview officials, an attorney describes necessary procedures for a prompt and fair resolution of a grievance by a Longview employee. The grievance hearing should begin by the Personnel Manager of Longview reading the employee's grievance to the Committee. And the memo says, "The employee should then be allowed to present facts supporting this grievance, **including the calling of witnesses.**" All testimony should be sworn. (Vol. 1 p 168).

The grievance committee is selected by the City Manager, and it has the power to investigate the water treatment division of Longview and to subpoena witnesses. The Longview Home Rule Charter, adopted January 1, 1979, expressly provides (Section 2.11. **Investigations** at Vol. 1 p 171):

> "The Council, the City Manager, or any person or **committee** authorized by either or both of them shall have power to inquire into the conduct of any department or office of the City; to make investigations as to City affairs, and for that purpose may **subpoena** witnesses, administer oaths and *compel the production of* books, papers and *other evidence material* to said inquiry."

Corley asks the other employees, who bear arms, to voluntarily appear and testify at the grievance hearing. (Vol. 1 p 204). They do not. His desired witnesses are under the control of Longview. (Vol. 1 p 213). Mike Brown

discusses the case with Rohner and Larry Schenk, the city attorney. (Vol. 1 p 208) Mike Brown says John Pickron asks if he (Pickron) has to attend the hearing. Brown refers him to Kay Wilkinson, the Human Resources Division Manager. She says witnesses appear only on a voluntary basis. (Vol. 1 pgs 194-195). Corley's letter, that asks Longview to produce Pickron, and other employees to testify at the hearing, is addressed to Wilkinson. Brown does not ask Pickron, Nelson or Beasley if they ever had guns at work. (Vol. 1 p 209, p 211).

A day or two after Corley's gun is found, Rohner tells Brown he wants Corley fired. (Vol. 1 p 214). Corley tells Rohner other employees have pistols at the plant. (Vol. 1 p 215). Since Corley was the only one caught, Rohner does not have a meeting with other employees to see if they have weapons. (Vol. 1 p 215). After seeing Corley's grievance, where the employees with guns are named, Rohner does not interview them. (Vol. 1 p 185, p 215). Rohner acknowledges he reads Corley's request that Nelson, Pickron and Beasley be present at the grievance hearing. Rohner say he asks Larry Schenk, "I asked a question whether or not *under our procedure* they needed to be here or not." (Vol. 1 p 215, p 216).

The grievance committee mistakenly asks for Trena Nelson. Mike Brown tells the grievance committee members she stays up late last night, that she's sleeping, and doesn't want to come. (Vol. 1 p 204). Kay Wilkinson informs the committee Trena Nelson starts work at 3:00 p.m. The committee tells Larry Schenk to proceed with his case, and Nelson is never produced at the hearing. The grievance committee members are city employees. (Vol. 1 p 212, p 213, p 217).

Rohner confirms the only reason Corley is fired is because he has a gun at work. (Vol. 1 p 216). Trena Nelson (white female), John Pickron (black male), and Cindy Beasley (white female) are still employed by Longview. (Vol. 1 p 202, p 203).

REASONS TO ALLOW WRIT OF CERTIORARI

The Longview Grievance Committee, an administrative body, and the lower courts, have decided important questions of federal law that have not been, but should be, settled by the Supreme Court. And the committee and lower courts have decided these questions in a way that conflicts with relevant decisions of this Court.

Do the constitutional provisions involved in this case require that employees must have subpoena powers to compel production of favorable testimony at post-termination hearings? Where the employer has such powers and refuses to summon witnesses, at the timely request of a terminated employee, are the pertinent constitutional rights of the employee violated? When prior Supreme Court decisions are considered, the answer to these questions is affirmative. *Williams v. Zuckert*, 371 U.S. 531, 9 L.Ed.2d 486, 83 S.Ct. 403, *vacated*, 372 U.S. 765, 10 L.Ed.2d 136, 83 S.Ct. 1102 (1963) and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543, 84 L.Ed.2d 494, 504, 105 S.Ct. 1487 (1985). And the following discussion of fact, and applicable federal and state law, compel granting certiorari.

Standard of Review. Summary judgment may be granted only when there is no issue of material fact and

the moving party is entitled to judgment as a matter of law. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655-656 (5th Cir. 1996). Summary judgment is inappropriate where there is a genuine disagreement as to the reasonable inferences to be drawn from undisputed facts. *Winters v. Highland Insurance Company*, 569 F.2d 297, 299 (5th Cir. 1978).

Corley's evidence is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). The trial judge is not to make credibility determinations, weigh evidence, draw from the facts legitimate inferences for Longview, or summarily accept Longview's arguments. *Anderson*, 106 S.Ct. at 2513; *Lindsey v. Prive Corporation*, 987 F.2d 324, 326 (5th Cir. 1993); *EEOC v. Olson's Dairy Queens, Inc.*, 989 F.2d 165, 168 (5th Cir. 1993). All reasonable doubt as to the existence of a genuine issue of material fact must be resolved against Longview and in the light most favorable to Corley. *EEOC v. AFGE Local 1617*, 657 F.Supp. 742, 743 (W.D. Tex. 1987) (citing *Jones v. Western Geophysical Company of America*, 669 F.2d 280, 283 (5th Cir. 1982). There is a failure to correctly apply the foregoing standards for review when the following facts and issues in Corley's response to Longview's motion for summary judgment are appraised by the lower courts.

Corley's Protected Employment

Property Interest. In her opinion (Vol. 1 page 242), the trial judge says Corley does not:

> " . . . provide sufficient evidence showing a personnel policy that City employees could only be discharged for just cause. The Plaintiff

> attached a document to his response that he refers to as "GB Exhibit 3," which states that employees may be dismissed by the Director/ Department head at any time for just cause. However, the document is not identified. It appears to be one page from a larger document. The page does not have a heading or any other indication of where it came from. Accordingly, this exhibit is insufficient to show the City has a personnel policy that employees can be only terminated for just cause, or consequently, that the Plaintiff has a property interest in his employment."

Exhibit 3 does have a heading and a clear indication of its source. (Vol. 1 page 193). The heading states "**Section: 15, Subject: Terminations, Last Revision Date: 01/10/86.**" The first paragraph of Exhibit 3 says:

> "Employees terminating from the service of the City, for any reason, shall be required to surrender and return to their department or other proper source all records and/or property of the **City of Longview** that may be in their possession and custody." (Emphasis added).

In his supporting affidavit, counsel affirms that all attachments to Corley's response to Longview's motion for summary judgment, which includes Exhibit 3, are true and correct and are derived from discovery and disclosures in this case.[2] (Vol. 1 p 151, p 167). The trial judge

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[2] At the Grievance Board Hearing, Exhibit 3 is referred to by the City Attorney as part of Longview's personnel manual. (GB pgs 56-58). Local Rule CV-26(c)(1)(B) "The Plan", requires each party to provide every other party a copy of all documents that are likely to bear significantly on any claim or defense.

errs when she does not believe or accept Exhibit 3. She errs when she refuses to draw justifiable inferences in Corley's favor from Exhibit 3. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986).

Corley cannot be terminated except for just cause. There must be a valid and just reason to fire him, and it must be explained to him. Therefore, Corley is not an at will employee. *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196 (5th Cir. 1987); *Johnson v. Ford Motor Company, Inc.*, 690 S.W.2d 90, 93 (Tex. App. – Eastland 1985, writ ref'd N.R.E.); *United Transp. Union v. Brown*, 694 S.W.2d 630, 632-633 (Tex. App. – Texarkana 1985, writ ref'd N.R.E.); and *Ramos v. Henry C. Beck Company*, 711 S.W.2d 331, 336-337 (Tex. App. – Dallas 1986, no writ). A "just cause" limitation on dismissal of a public employee creates an individual entitlement to continued employment that is considered a protected property right for the purposes of the due process clause. *Brandy v. City of Cedar Hill*, 884 S.W.2d 913, 915 (Tex. App. – Texarkana 1994, writ denied).

Corley's property interest in employment, sufficient to invoke procedural due process protection, is created by the grievance review system of Longview. The grievance system indicates the mutual understanding that Corley may be discharged only for "cause" and he has a right to challenge that "cause." *Glen v. Newman*, 614 F.2d 467, 471-472 (5th Cir. 1980) and *Bumstead v. Jasper County*, 931 F.Supp. 1323, 1329 (E.D. Tex. 1996). (Vol. 1 pgs 177-178).

Longview's grievance procedures state "Employees need never hesitate to present a grievance. Employees can be absolutely certain that their standing with the City

will not be adversely affected in any way." (Vol. 1 p 177). This language is a special and meaningful modification of Longview's claim it can terminate Corley at will. *Vida v. El Paso Employees' Federal Credit Union,* 885 S.W.2d 177 (Tex. App. – El Paso 1994, no writ). Corley has a sufficient employment property interest to invoke procedural due process protection.

Longview's Duty and Failure to Protect Corley.

Longview has specific control over the safety and security of the Cherokee Water Treatment Plant. When he is at work there, Longview has a duty to adequately protect Corley from foreseeable harm by trespassers. *Travis v. City of Mesquite,* 830 S.W.2d 94, 105 (Tex. 1992); *Exxon Corporation v. Perez,* 867 S.W.2d 19 (Tex. 1993) and *Guerro v. Memorial Medical Center,* 938 S.W.2d 789, 791-792 (Tex. App. – Beaumont 1997, no writ).

Mike Brown finds the capital cost would be substantial to implement the security measures the survey recommends. Three lights are just put on poles because there is no capital cost, and more phones are provided. (Vol. 1 p 212).

Corley's Right of Self-Defense. The Texas Constitution article 1 § 23 gives Corley the right to keep arms in the lawful defence of himself or the State. Texas Penal Code § 46.03(2) expressly states it is no offense for Corley to have a handgun on private premises, or at work premises under his control. *State v. Duke,* 42 Tex. 455 (1875); *Poston v. State,* 104 S.W.2d 516 (Tex. Crim. App. 1937) and

Birch v. State, 948 S.W.2d 880, 883-884 (Tex. App. – San Antonio 1997, no pet.). When he is there alone at night, Corley controls the Cherokee Water Treatment Plant. *Op. Tex. Att'y Gen.* No. H-185 (1973).[3] In Texas, Corley may lawfully possess a pistol at the plant to defend it and himself. Texas Penal Code Chapter 9. *Justification Excluding Criminal Responsibility.* Under the circumstances in this case, Corley has an affirmative defense to criminal prosecution for having a pistol at work, whether the prosecution is under state law or Longview's ordinance prohibiting weapons at work. (Vol. 1 pgs 98-105).

It is very clear these circumstances and testimony create material fact issues about whether Corley is justified in having a pistol at the plant, or whether the prohibition about having pistols there is, in this case, unconstitutional under Texas law and unreasonable and should be ignored. 33 Tex. Jr. 3d **Employer and Employee** §§ 164, 240. – *Circumstances justifying violation.* These material facts could persuade a jury that Corley, under the circumstances, 1) has the common sense to protect himself and 2) that there is no just cause to terminate him. The evidence is sufficient to support a verdict in Corley's favor. *Anderson v. Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 25109.

Denial of Due Process, Equal Protection and the Right to Compulsory Process. On August 4, 1997, Corley hand delivers a letter to Mike

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[3] Texas Attorney General opinions are found on the internet. http://www.arts.state.tx.us/

Brown and the City Secretary. They are informed other employees in the same situation carry firearms to work. When these employees are left at work, discrimination against Corley is established. Corley says the City takes unreasonable and arbitrary action against him that violates his employment and civil rights. (Vol. 1 pgs 182-183).

On August 6, 1997, Corley files his grievance. He says the Cherokee Water Treatment Plant is in a high crime area, there is no meaningful and effective security there, and Cindy Beasley, Trena Nelson and John Pickron are other employees who have firearms when they work at the plant. When he is alone at the plant with a firearm, there cannot be any loss, inconvenience or injury to absent city workers. (Vol. 1 pgs 185-186).

The Supreme Court states dismissals for cause will often involve factual disputes. Often, it is unclear that discharge of an employee is appropriate or necessary. One purpose of the hearing is to reduce the risk of erroneous termination. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543, 105 S.Ct. 1487, 84 L.Ed.2d 494, 504 (1985). To avoid this, the employee is entitled to an opportunity in a meaningful manner to make his case before the grievance committee, and this opportunity does not depend on a demonstration of certain success. *Cleveland Board*, 470 U.S. 544, 84 L.Ed.2d 505.

Brown and Rohner want to quickly fire Corley. They do. At the grievance hearing, Longview produces Brown and Rohner, but not Beasley, Nelson and Pickron. The latter three are encouraged or induced by Longview (Brown's referral of Pickron to Wilkinson, who says

appearance is voluntary, Nelson's double shift, she must be at work by 3:00 p.m. on August 21, 1997, and the City Attorney says don't bring them) to miss the hearing. Committee Member Harvey, says the other employees would incriminate themselves if they came to the hearing. (Vol. 1 p 195). At the hearing, Brown and Rohner say they never ask Beasley, Wilkinson and Pickron if they have firearms at the Cherokee plant.

Despite the clear admonition from an attorney that Corley should be allowed to present facts supporting his grievance, including the calling of witnesses, Longview does not allow production of Corley's desired witnesses, who are under the control of the city. Welch, a supervisor, is called in to refute Corley's statement that other employees tell Welch they have guns. Beasley, Nelson and Pickron are not produced. Therefore, Brown, Rohner, Wilkinson, Schenk and the Grievance Committee adopt a "Don't ask, don't tell, don't produce" policy when it concerns witnesses whom they have not sufficiently influenced to side with them on a crucial issue by the time of the grievance hearing. According to the Supreme Court, in *Williams v. Zuckert*, 371 U.S. 531, 9 L.Ed.2d 486, 83 S.Ct. 403 (1963), and its memorandum opinion at 372 U.S. 765, 10 L.Ed.2d 136, 83 S.Ct. 1102 (1963), Corley complies with all requirements for production of his desired city employee witnesses. Longview violates the due process clause when it does not produce Corley's requested witnesses at the post-termination hearing. He is denied equal protection of the law where he has no subpoena powers and Longview can produce any witness it desires.

Corley is certainly not presented a meaningful opportunity to tell the full story to the grievance committee, who is conducting a *post-termination hearing on August 21, 1997.*[4] The Supreme Court is clear that minimal due process is only tolerated, at a pre-termination hearing, when the first hearing is followed by a prompt post-termination proceeding that allows the fired employee to fully develop evidence to gain reinstatement and back pay. *Brandy v. City of Cedar Hill,* 884 S.W.2d 913, 915 (Tex. App. – Texarkana 1994, writ denied). The right of the employee to subpoena witnesses, and to otherwise have witnesses under the control of the employer produced, is a constitutional requirement of procedural due process after the Longview powers that be want to hear only one employee, Corley, has a gun at work. This violates the statement, "a formal grievance procedure has been designated to provide *a fair* and prompt hearing." (Vol. 1 p 177). Corley objects to his lack of subpoena power at the post-termination grievance hearing and Longview's refusal to produce the desired witnesses. (Vol. 1 p 194).

The trial judge errs when she completely ignores a post-termination hearing requires more than minimal due process. And it is clear the lower court's opinion is wrong where it states (Vol. 1 p 243), "There is no indication that the Defendant in any way hindered Plaintiff's witnesses from testifying at his grievance hearing. He (Corley) does not allege that he was prevented from presenting any evidence or testimony that was available." The record

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[4] Corley is fired July 30, 1997. He is appealing his termination, which is an administrative procedure addressed in the earlier attorney memorandum for Longview.

shows the contrary. In his post-termination hearing, Corley's procedural due process rights are violated by Longview. *Cleveland Board* at 470 U.S. 546-548, 84 L.Ed.2d 506-507; *Brandy* at 884 S.W.2d 915.

Corley is denied equal rights under the law by Longview. In her opinion, the trial judge states, "The Plaintiff does not, and cannot show, that he is a person similarly situated with the City of Longview." (Vol. 1 p 244). The Longview Grievance Committee has subpoena powers and Corley does not. Longview and its grievance committee are persons who may be held liable for civil rights violations of its employees that they sanction or order. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978). It is a clear denial of Corley's equal protection for Longview to have subpoena powers to secure testimony from its witnesses and, at the same time, deny Corley subpoena power to obtain testimony from his desired witnesses. This is especially true when all city employee witnesses whom Longview desires "voluntarily" appear to testify against Corley, and where all city employee witnesses whom Corley wants are allowed (or told) by Longview to be absent from the grievance board hearing. Corley's employment contract is with Longview, who is responsible for assuring an absence of employment discrimination. *Garner v. Giarrusso*, 570 F.2d 1330, 1341 (5th Cir. 1978).

Other Federal Actions. Pickron is allowed to remain on the job after he is told to remove a weapon from the plant. (Vol. 1 p 185) And other employee with guns are not produced at the post-termination hearing, and they

are not fired. Prohibited federal discrimination is established when other employees (two white females and a black male), who commit the same or similar violation, are left at work. *Green v. Armstrong Rubber Company*, 612 F.2d 967 (5th Cir. 1980) and *Gunner v. Chevron*, 684 F.Supp. 916, 920 (E.D. Tex. 1988).

In its motion for summary judgment, Longview admits Corley may bring a reverse discrimination action under 42 U.S.C. § 2000(e), Title VII as amended in 1991, that he is qualified, and he is discharged. However, Longview errs when it says that no action under Title VII lies because Corley is replaced by a white male. See *EEOC v. Brown & Root, Inc.*, 688 F.2d 388 (5th Cir. 1982).

Actions lie under 42 U.S.C. §§ 1983, 1985, 1986, and 1988 for Corley to recover damages and attorneys fees from Longview when the city violates his rights to due process and equal protection. *Sexton v. Gibbs*, 327 F.Supp. 134 (N.D. Tex. 1971) affirmed *per curiam* 446 F.2d 904 (5th Cir. 1971).

In her opinion, the trial judge writes (Vol. 1 p 244):

> "The Plaintiff is apparently attempting to add new claims to his lawsuit through his response to Defendant's motion for summary judgment. The complaint alleges racial and sexual discrimination pursuant to title VII and violations of 42 U.S.C. §§ 1981, 1983, 1985 and 1986 for violations of his rights to due process and equal protection. It is inappropriate for the plaintiff to add new claims in his response to a motion for summary judgment and they will not be considered."

The trial judge is in error. Said matters are raised in Plaintiff's Original Complaint and in the Elements of Plaintiff's Causes of Action. Both instruments are filed months before summary judgment is rendered. (Vol. 1 pgs 2-4, 31-36).

CONCLUSION

The writ of certiorari should issue, and the judgments of the lower courts reversed and this case remanded for trial.

Respectfully submitted,

FRANKLIN LEE SUPERCINSKI
Counsel of Record
LAW OFFICES FRANK L. SUPERCINSKI
123 Gilmer Road, Suite 2
P.O. Box 189
Longview, Texas 75606
Telephone 903/236-0151

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-41328
Summary Calendar

WILBERT CORLEY,

Plaintiff-Appellant,

VERSUS

CITY OF LONGVIEW,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(6:97-CV-1068)

(Filed May 04, 1999)

Before SMITH, WIENER, and PARKER, Circuit Judges.

PER CURIAM:*

Wilbert Corley, a white male, was fired from his job as a city employee for taking a gun to work. He sued for race and sex discrimination and denial of due process and equal protection. The magistrate judge, sitting by consent, granted summary judgment in favor of the city and supported her ruling with a thorough and convincing fourteen-page opinion. Finding no error, much less

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

reversible error, we affirm, essentially for the reasons given by the magistrate judge.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-41328
Summary Calendar

D.C. Docket No. 6:97-CV-1068

WILBERT CORLEY

Plaintiff-Appellant

v.

CITY OF LONGVIEW

Defendant-Appellee

Appeal form the United States District Court for the Eastern District of Texas, Tyler.

Before SMITH, WIENER, and PARKER, Circuit Judges.

JUDGMENT

(Filed May 04, 1999)

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: MAY 26 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

WILBERT CORLEY	§	CIVIL ACTION NO. 6:97cv1068
v.	§	
CITY OF LONGVIEW, TEXAS	§	
	§	

MEMORANDUM OPINION AND ORDER ON CITY OF LONGVIEW'S MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 15, 1998)

The Plaintiff initiated the above-styled lawsuit on December 10, 1997. The case was transferred to the undersigned with the consent of the parties on May 4, 1998, pursuant to 28 U.S.C. § 636(c). The Defendant filed a Motion for Summary Judgment (docket #20). The Plaintiff filed a response on October 7, 1998. A reply to the Plaintiff's response and an objection to summary judgment evidence offered by the Plaintiff were filed by the Defendant on October 14, 1998. Based on the argument and evidence presented to date, and in consideration of the relevant legal standards, the undersigned concludes that Defendant's motion for summary judgment should be granted.

Background

The Plaintiff is a former employee of the City of Longview. He was employed by the City for approximately 17 years. In July of 1997, the Plaintiff worked at

the Cherokee Water Treatment Plant. His shifts were from 11:00 p.m. to 7:00 a.m. On July 23, 1997, the Plaintiff had a gun with him at work and he left the gun on his desk when he ended his shift on the morning of July 24, 1997. The gun was discovered by a supervisor and the Plaintiff was interviewed concerning the incident that same day. He admitted that he owned the gun and he was placed on administrative leave with pay. The Plaintiff's supervisor, Mike Brown, issued a pre-termination letter on July 29, 1997, outlining his recommendation that the Plaintiff be terminated for violating a work rule prohibiting employees from bringing firearms to work. A hearing was conducted that same date. The Plaintiff was asked about the gun and his reasons for carrying it. The following day, Ed Rohner, Director of Public Services, issued a letter terminating the Plaintiff's employment. Subsequently, the Plaintiff filed a grievance challenging his termination and he received a grievance hearing on August 21, 1997. The Plaintiff was represented by counsel at the hearing. He asked the grievance panel to provide three witnesses for him at the hearing. None of the witnesses appeared at the hearing. The grievance board voted to recommend that the Plaintiff's termination be upheld. Ted Willis, the City Manager, issued a letter to the Plaintiff on September 23, 1997, informing him that he concurred with the grievance panel's recommendation. The Plaintiff filed the present lawsuit on December 10, 1997.

In the complaint, the Plaintiff alleges that his termination was discriminatory, on the basis of his sex and race, and that his procedural due process and equal protection rights were violated. According to the Plaintiff,

several other employees carried guns at the plant and were not terminated. In addition, he complains that he needed the gun for his protection while working at the plant at night.

The Defendant filed its motion for summary judgment on June 19, 1998. First, the Defendant argues that the Plaintiff did not have a right to have his gun at work. Next, the Defendant submits that the Plaintiff's termination was not discriminatory. The Defendant points out that the Plaintiff, a white male, was replaced by another white male. In addition, the Defendant asserts that the three employees alleged by the Plaintiff to have carried guns to work, deny this allegation in their depositions. For the same reasons, the Defendant claims that the Plaintiff's termination was not in violation of the Texas Labor Code. Finally, the Defendant concludes that the Plaintiff's equal protection and procedural due process rights have not been violated because there is no evidence the Plaintiff was treated differently than any other employee and he does not have a property interest in his employment. Assuming for the sake of argument that the Plaintiff does have a property interest, the Defendant argues that he was provided process sufficient to meet the requirements of procedural due process.

The Plaintiff filed his response on October 7, 1998. He attached a "Statement of Genuine Issues and Supporting Affidavit" to his response. It should be noted, however, that the Plaintiff does not state what genuine issues of material fact exist. As explained in Rule 56(c) of the Local Rules for the Eastern District of Texas, in deciding the motion for summary judgment, the court will assume that the facts as claimed by the Defendant and supported by

admissible evidence are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues." The Plaintiff does not controvert any facts in his "Statement of Genuine Issues." Rather, he simply makes a general statement that his response and attachments are "true and correct." The purpose of the "Statement of Genuine Issues" is for the party opposing the summary judgment motion to direct the court's attention to the material issues that are controverted. As stated in Rule 56(c), "[t]he court will not scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact for trial before entering summary judgment."

In the response, the Plaintiff argues that he has a property interest in his employment because he could not be terminated without just cause. He submits that he has established discrimination because after informing his superiors that other employees carry firearms to work, the other employees were not terminated. According to the Plaintiff, he was denied due process because the grievance panel did not procure the testimony of three witnesses at his grievance hearing. The Plaintiff asserts that the witnesses were under the control of the Defendant because they were city employees. He objects to his lack of subpoena power to insure the attendance of his requested witnesses.

Standard

Rule 56(c) of the FED. R. CIV. P. provides that the Court may only grant a motion for summary judgment when there is no genuine issue of material fact and the

moving party is entitled to summary judgment as a matter of law. The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986). The moving party, however, "need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc). The movant's burden is only to point out the absence of evidence supporting the nonmoving party's case. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir.1996). Once, the moving party makes a properly supported motion for summary judgment, the nonmoving party must look beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. *Id.* Neither "conclusory allegations" nor "unsubstantiated assertions" will satisfy the nonmovant's burden. *Id.*

Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565 (5th Cir.1987). The district court must look to the full record, including the pleadings, affidavits, and depositions. *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir.1988). Under this standard, fact questions are considered with deference to the nonmovant. *Reid v. State Farm Mutual Automobile Insurance Co.*, 784 F.2d 577, 578 (5th Cir.1986). The evidence of the nonmovant is to be believed and all inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). The Court resolves factual controversies for purposes of summary judgment in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *Little v. Liquid Air Corp.*, 37 F.3d at 1075. The Court does not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts. *Wallace v. Texas Tech University*, 80 F.3d 1042, 1048 (5th Cir.1996) (citing *Little v. Liquid Air Corp.*, 37 F.3d at 1075).

An issue is "genuine" if the evidence supporting its resolution in favor of the party opposing summary judgment, together with any inference in such party's favor that the evidence allows, would be sufficient to support a verdict in favor of the party. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir.1987). A "material fact" is one that might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510.

Discussion and Analysis

The City of Longview adopted an ordinance in 1995 which included a rule prohibiting City employees from carrying firearms while at work or on City property. Signs were posted at the Plaintiff's place of employment, the Cherokee Water Treatment Plant, stating that employees could not carry firearms while at work or on City property. The Plaintiff knew about the rule and was present during at least one meeting where the rule was discussed. Throughout the Plaintiff's pleadings and his deposition, he acknowledges that he knew about the rule

and took a gun to work knowing that it was prohibited. There is no dispute about these facts.

There is also no factual dispute concerning the sequence of events that occurred from the time when the Plaintiff's gun was discovered through the time when his termination was upheld by the City Manager upon recommendation of the grievance panel. When the gun was found on the Plaintiff's desk, the Plaintiff was questioned about it. After admitting that he brought the gun to work, the Plaintiff was placed on paid administrative leave. Approximately five days later, Mike Brown issued a pre-termination letter and Ed Rohner conducted a pre-termination hearing. The following day, Ed Rohner issued a letter terminating the Plaintiff's employment. The Plaintiff filed a grievance challenging his termination. A panel of three City employees was appointed to hear the Plaintiff's grievance and they conducted a hearing on August 21, 1997. Subsequently, the panel determined that the Plaintiff's termination should be upheld and issued this recommendation to the City Manager. The City Manager concurred with the panel's recommendation.

Discrimination

The Plaintiff, a white male, alleges discrimination based on his sex and race. When a motion for summary judgment is before the court, the focus in an employment discrimination case is whether a genuine issue exists as to whether the defendant intentionally discriminated against the plaintiff. *Grimes v. TX Dept. of Mental Health*, 102 F.3d 137, 139 (5th Cir.1996). A plaintiff's self-serving

statements of his subjective belief that he was discriminated against are insufficient. *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir.1994). A plaintiff's response to a motion for summary judgment must present evidence, rather than conjecture and speculation, that the defendant discriminated against him. See *Little v. Liquid Air Corp*, 37 F.3d at 1079.

To succeed on a claim of intentional discrimination under Title VII, Section 1983, or Section 1981, a plaintiff must first prove a *prima facie* case of discrimination. *Wallace v. Texas Tech Univ.*, 80 F.3d at 1047. A plaintiff can prove discrimination by producing direct evidence of discriminatory motive or through a four-element test that allows an inference of discrimination. *Meineke v. H&R Block of Houston*, 66 F.3d 77, 83 (5th Cir.1995). The four elements in a case where the plaintiff has been terminated are: (1) that the plaintiff is a member of a protected class; (2) that he was qualified for his position; (3) that he was terminated from that position; and (4) that following his termination, the employer hired an applicant with the plaintiff's qualifications but not in his protected class. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-03, 93 S.Ct. 1817, 1824 (1973). If the plaintiff shows a *prima facie* case of discrimination, the burden shifts to the defendant to come forward with a legitimate, nondiscriminatory reason for the challenged employment action; if the defendant is successful, the inference of discrimination created by the plaintiff's *prima facie* case disappears and the plaintiff must then prove, by a preponderance of the evidence, both that the defendant's articulated reason is false and that the defendant intentionally discriminated.

Walton v. Bisco Industries, Inc., 119 F.3d 368, 370 (5th Cir.1997).

With its motion for summary judgment, the Defendant submitted portions of the depositions taken of the three employees that the Plaintiff alleges also carried guns to work but were not terminated. Each employee, Cindy Beasley, Trena Nelson and John Pickron, denied ever having a gun at work or telling the Plaintiff that he or she had a gun at work. Cindy Beasley and Trena Nelson are white females and John Pickron is a black male. The Defendant also attached an affidavit of Ron Welch, a supervisor at the plant, in which Welch states that he was not aware of any employees carrying a gun to the plant until he found the Plaintiff's gun and has not been made aware since that other employees carry guns. An affidavit of Ed Rohner, the Director of Public Services Department of the City of Longview, state that he is not aware of any employee other than the Plaintiff who has carried a firearm to work in violation of the policy. The affidavit of Mike Brown affirms that he Plaintiff, a white male, was replaced with a white male following his termination.

Other than his own self-serving statements, the Plaintiff provided no evidence to show that other employees had guns at work or that supervisors knew other employees had guns at work and did not terminate them. In his response, the Plaintiff repeatedly makes claims that other employees carried guns at the plant and then cites his own testimony either by deposition or from the grievance hearing as his evidentiary support. Needless to say, unsubstantiated assertions are not competent summary judgment evidence. *Forsyth v. Barr*, 19 F.3d

1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871, 115 S.Ct. 195 (1994). The nonmovant cannot satisfy his burden with conclusory allegations or unsubstantiated assertions. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429 (5th Cir.1996) (en banc). The Plaintiff submitted no evidence to rebut the Defendant's evidence showing that he was replaced with a white male. Therefore, there is no evidence before the Court to show that the Defendant hired someone outside of the Plaintiff's class following the Plaintiff's termination. Accordingly, the Plaintiff has not established a *prima facie* case of discrimination.

Even if the Court were to assume, *arguendo*, that the Plaintiff did show the elements of a *prima facie* case of discrimination, the Defendant has articulated a legitimate, nondiscriminatory reason for the Plaintiff's termination and provided summary judgment evidence in support. The Plaintiff knowingly and intentionally violated a work rule when he brought a gun to work.

The burden now shifts to the Plaintiff to show that the Defendant's stated reason is false and the Defendant intentionally discriminated against him. *Walton v. Bisco Industries, Inc.*, 119 F.3d at 370. To create a jury question, there must be a conflict in substantial evidence. *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 449 (5th Cir.1996). Substantial evidence, in the context of an employment discrimination case, is evidence that would allow a rational factfinder to make a reasonable inference that race or sex was a determinative reason for the employment decision. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir.1996). Thus, the Court is left with the following standard: "a plaintiff can avoid summary judgment if the

evidence, taken as a whole: (1) creates a fact issue as to whether each of the employer's stated reasons was not what actually motivated the employer and (2) creates a reasonable inference that race was a determinative factor in the actions of which the plaintiff complains." *Grimes v. TX Dept. of Mental Health*, 102 F.3d at 141 (citing *LaPierre v. Benson Nissan, Inc.*, 86 F.3d at 450 and *Rhodes v. Guiberson Oil Tools*, 75 F.3d at 994).

In the present case, the Plaintiff provided no evidence to show that the Defendant was motivated by anything other than the Plaintiff's violation of a work rule against bringing firearms to work when the Plaintiff was terminated. He merely relies upon his own speculation that he was fired due to his race and sex even though he was replaced by someone of the same race and sex. The Plaintiff has not created a reasonable inference that race or sex was a determinative factor in his termination. Accordingly, the undersigned finds that there is no genuine issue of material fact concerning the Plaintiff's discrimination claim and the Defendant is entitled to judgment as a matter of law on this issue.

It should be noted that the Plaintiff goes to great lengths in his response to explain his reasons for carrying a gun to work and to assert his alleged right to bear arms. He alleges that he felt unsafe. This evidence is irrelevant to his claim of discrimination.

Procedural Due Process

The Plaintiff also alleges that he was denied procedural due process with respect to his termination. The crux of this claim is that the Plaintiff complains that the

grievance panel did not guarantee the presence of three witnesses requested by him for his grievance hearing.

The first step in considering the Plaintiff's due process claim is to determine whether he had a property interest in his employment. See *Bishop v. Wood*, 426 U.S. 341, 343-47, 96 S.Ct. 2074, 2076-79 (1976). Property interests are not created by the Constitution; "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Schaper v. City of Huntsville*, 813 F.2d 709, 713 (5th Cir.1987) (citing *Bishop v. Wood*, 426 U.S. at 577, 92 S.Ct. at 2709). A personnel policy which allows only for dismissal upon "just cause" is sufficient to create a property interest in employment. *Id.* at 713-14; see also *Cleveland v. Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985).

The Defendant adamantly argues that the Plaintiff is an at-will employee who does not have a property interest in his employment. The Plaintiff does not deny that he is not a contractual employee, but he asserts that he was not an at-will employee because he could not be terminated without just cause. He does not, however, provide sufficient evidence showing a personnel policy that City employees could only be discharged for just cause. The Plaintiff attached a document to his response that he refers to as "GB Exhibit 3," which states that employees "may be dismissed by the Director/Department Head at any time for just cause." However, the document is not identified. It appears to be one page from a larger document. The page does not have a heading or any other indication of where it came from. Accordingly, this

exhibit is insufficient to show that the City has a personnel policy that employees can only be terminated for just cause or, consequently, that the Plaintiff has a property interest in his employment.

The Plaintiff also relies upon the City's grievance procedures to show that he has a property interest in his employment. He asserts that the following language in the grievance policy or procedures modifies his at-will employment status: "Employees need never hesitate to present a grievance. Employees can be absolutely certain that their standing with the City will not be adversely affected in any way." The Plaintiff does not explain, and the Court fails to see, how the Plaintiff makes the leap from a City policy that employees will not be retaliated against for filing grievances to a finding that he cannot be terminated except for just cause. The undersigned finds that the Plaintiff has not shown a property interest in his employment.

In any event, even if the Court were to assume for the sake of argument that the Plaintiff did have a property interest in his employment, the process afforded the Plaintiff was sufficient. The Due Process Clause requires that a state, before depriving a citizen of property, provide "some kind of a hearing." *Cleveland v. Board of Education v. Loudermill*, 470 U.S. at 542, 105 S.Ct. at 1493. Due process requires only "notice and an opportunity to respond." *Id.* at 546, 105 S.Ct. at 1495. "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.*

The Plaintiff does not dispute that the following occurred: he was confronted by his supervisor when the gun was found and asked about it; he received a pre-termination letter outlining the misconduct called into question and notifying him that a pre-termination hearing would be conducted; he received a pre-termination hearing where he was asked if he carried a gun and was given an opportunity to explain his conduct; he received a letter following the pre-termination hearing notifying him of the decision to terminate his employment; he utilized available grievance procedures to file a written grievance challenging his termination; and a grievance panel conducted a hearing which provided the Plaintiff an opportunity to present his version of the events, including evidence and witnesses that were present.

The Plaintiff asked the grievance panel to ensure the presence of three witnesses at the grievance hearing. Apparently, these witnesses were asked to appear but chose not to. They were not subpoenaed. The Plaintiff complains that his grievance hearing was not fair and did not provide him a meaningful opportunity to tell his story because his three witnesses were not present to testify.

There is no indication that the Defendant in any way hindered Plaintiff's witnesses from testifying at his grievance hearing. He does not allege that he was prevented from presenting any evidence or testimony that was available. The Plaintiff asks the Court to impose a duty on the Defendant to compel the presence of requested witnesses at a post-termination grievance hearing, which is essentially an appeal of his termination. However, the Plaintiff does not cite any case law or other authority for

imposing such a duty. The undisputed facts clearly show that the Plaintiff was provided ample notice and an opportunity to be respond [sic] at a meaningful time. He has not shown that the process afforded him was constitutionally defective. The undersigned finds no genuine issue of material fact concerning the Plaintiff's procedural due process claim and the Defendant is entitled to judgment as a matter of law on this issue.

Equal Protection

The Plaintiff postures his equal protection claim in the following manner; the City has subpoena powers for the grievance hearing and he does not. This claim is essentially a restatement of his procedural due process claim. The Fourteenth Amendment includes a guarantee that all persons similarly situated shall be treated alike. The Plaintiff does not, and cannot, show that he is a person similarly situated with the City of Longview. He makes no claim that any other terminated employee was able to subpoena witnesses for a grievance panel hearing. The undersigned finds that there is no genuine issue of material fact concerning Plaintiff's claim that he was denied equal protection and the Defendant is entitled to judgment as a matter of law.

Plaintiff's Additional Claims

The Plaintiff is apparently attempting to add new claims to his lawsuit through his response to Defendant's motion for summary judgment. The complaint alleges racial and sexual discrimination pursuant to Title VII and violations of 42 U.S.C. §§ 1981, 1983, 1985 and 1986 for

violations of his rights to due process and equal protection. It is inappropriate for the Plaintiff to add new claims in his response to a motion for summary judgment and they will not be considered.

In light of the foregoing, after careful consideration, it is hereby

ORDERED that the City of Longview's Motion for Summary Judgment (docket #20) is **GRANTED**. The above-styled lawsuit is hereby **DISMISSED** with prejudice, the parties bearing their own costs. Any motion not previously ruled on is **DENIED**.

SIGNED this 15th day of October, 1998.

/s/ Judith K. Guthrie
JUDITH K. GUTHRIE
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT TEXAS
TYLER DIVISION

WILBERT CORLEY	§	CIVIL ACTION NO. 6:97cv1068
v.	§	
CITY OF LONGVIEW, TEXAS	§	
	§	

FINAL JUDGMENT

(Filed Oct. 15, 1998)

The above-entitled action has come before the Court for consideration, and decision having been duly rendered, it is hereby

ORDERED and **ADJUDGED** that the Plaintiff be granted no relief and that the above-entitled action be **DISMISSED**.

SIGNED this 15th day of October, 1998.

/s/ Judith K. Guthrie
JUDITH K. GUTHRIE
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

WIBERT CORLEY,	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
V.	:	6:97CV1068
CITY OF LONGVIEW,	:	(Judge Judith K. Guthrie)
Defendant.	:	

NOTICE OF APPEAL

(Filed Oct. 22, 1998)

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that Wilbert Corley, plaintiff above named, hereby appeals to the United States District Court of Appeals for the Fifth Circuit from the final judgment entered on the docket in this action on October 19, 1998.

Respectfully submitted,

/s/ Frank L. Supercinski
FRANK L. SUPERCINSKI
State Bar No. 19516000
P.O. Box 189
Longview, Texas 75606
Telephone 903/236-0151
Facsimile 903/236-0118

ATTORNEY FOR PLAINTIFF

EXHIBIT 1

Frank L. Supercinski
Attorney

P.O. Box 189 • Longview,
Texas 75606 • (903) 236-0151

Certified Specialist
Civil Trial-Appeal Law
Texas Board of Legal Specialization

August 13, 1997

Via Facsimile 903/758-7467
Kay Wilkinson
Human Resources Division Manager
City of Longview
119 W. Tyler Street, Suite 282
Longview, Texas 75606

Re: Wibert Corley Grievance Hearing

Dear Ms. Wilkinson:

During the above hearing, Wilbert Corley asks that the City of Longview provide the following city employees as witnesses:

1) Wilbert Corley
2) Mike Brown
3) Ron Welch
4) Trena Nelson
5) John Pickron
6) Cindy Beasley

7) Suzanne Renfroe

8) Kay Wilkinson

Thanking you for your courtesies, I am

Sincerely yours,

/s/ Frank L. Supercinski
FRANK L. SUPERCINSKI

FLS:fls

cc: Wilbert Corley

EXHIBIT 3

Section: 15 **Revision Date:**
Subject: Terminations **Last Revision Date: 01/10/86**

Employees terminating from the service of the City, for any reason, shall be required to surrender and return to their department or other proper source all records and/or property of the City of Longview that may be in their possession or custody.

A. Resignation: An employee may leave the service of the City in good standing by submitting notice of resignation to his/her Director/Department Head at least ten (10) working days before leaving. Failure to give such notice shall be entered in the service record of the employee and may be considered grounds to disapprove terminal pay covering any unused vacation leave. The Director/Department Head shall submit notice of employee's resignation to the Personnel Department on a personnel action (Advice of Change) form, indicating thereon the effective date of resignation and his/her reason for leaving the City's service. Where the best interest of the employee and the City might be served, a Director/Department Head may ask for the resignation of an employee.

B. Layoff: Directors/Department Heads shall lay off employees when necessary due to change in duties or organization, or lack of work or funds. When possible, employees who are laid off in one department will be integrated into other departments by transfer. When layoffs are required, employees shall be retained first on the basis of demonstrated job performance, efficiency and second on length of service to the City. Layoffs shall not be considered as

disciplinary action and Directors/Department Heads will give permanent full-time employees who are being laid off two (2) weeks notice.

C. Dismissal: An employee may be dismissed by the Director/Department Head at any time for just cause. An employee who is dismissed shall have explained to him the reasons for the action. The explanation section of the personnel action (Advice of Change) form shall include reason or reasons for the dismissal. Unauthorized absence from work may be considered by the Director/Department Head as a reason for termination.

D. Employees terminating on other than the normal pay period shall be paid for the number of days employed from the last pay period to their final working day. No final check shall be released until the employee has signed a termination of employment release and has properly handled unfinished business concerning retirement fund, insurance cancellation and exit interviews. City property including uniforms, inclement weather gear, gasoline cards and keys must also be turned in to the appropriate department prior to issuance of the final check.

Supreme Court, U.S.
FILED
JUL 21 1999
OFFICE OF THE CLERK

No. 98-2022

IN THE

Supreme Court of the United States

WILBERT CORLEY,

Petitioner,

v.

CITY OF LONGVIEW, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent City of Longview, Texas perceives that Petitioner's Statement of the Case contains misstatements of the facts that bear on the issues presented. In particular, the following matters misrepresent the evidence before the trial court and Court of Appeals.

A. Petitioner interjects his own hearsay testimony into the statement of the case concerning statements allegedly made to him by other City employees to show that other employees had guns at work.

These hearsay statements are used by Mr. Corley to justify his violation of a work rule prohibiting employees from carrying guns at work. Mr. Corley cites Federal Rule of Evidence 804(b)(6) in support of his position, apparently saying that the City of Longview intentionally caused these witnesses to be unavailable. That is simply not the case. These witnesses were not subpoenaed by the City of Longview; however, the City did not take any action to prevent these witnesses from testifying. The record reflects that the City of Longview asked at least one of the witnesses to appear, but she did not do so. Other than Corley's hearsay statements, there was no evidence before the grievance panel or the trial court that any other City employee has violated this work rule.

B. Petitioner's use of hyperbole regarding Mr. Corley's concerns at his place of work misrepresents conditions at the plant.

Mr. Corley fails to include in his "factual" recitation that no crime has ever been committed at his workplace, and it fails to state that no City of Longview employee working at this plant, including Mr. Corley, has ever been threatened, assaulted or robbed there.

In order to clarify what Respondent believes are the relevant facts that bear on the issues that would be before the Court if certiorari is granted, Respondent submits the following Statement of the Case.

STATEMENT OF THE CASE

On December 14, 1995, the City Council of the City of Longview, Texas, adopted a rule prohibiting City employees from carrying guns while at work or on City property. This rule was communicated to City of Longview water treatment plant operators, including Mr. Wilbert Corley, a white male, in a meeting held on May 3, 1996 by Mike Brown, Water Utility Plant Manager.

On July 23, 1997, Wilbert Corley took a hand gun to work. When Mr. Corley was confronted with this work rule violation, he admitted the gun was his. On July 26, 1997, Mr. Corley was placed on paid administrative leave by Mike Brown. On July 29, 1997, Mr. Brown sent Mr. Corley a letter advising Mr. Corley that he was recommending that Mr. Corley's employment with the City be terminated. This letter also advised Mr. Corley of his right to a pre-termination hearing. A pre-termination hearing was held with Mr. Ed Rohner, Director of Public Services. Following this hearing, Mr. Rohner determined that Mr. Corley should be discharged for violating the City's rule prohibiting employees from having guns at work, and he sent Mr. Corley a letter terminating his employment. This letter also advised Mr. Corley he had the right to appeal this decision. When he made the decision to terminate Mr. Corley, Mr. Rohner was not aware of any other City employees, regardless of race or sex, who had violated this work rule.

Mr. Corley filed a grievance with the City of Longview contesting his discharge. A grievance panel of three City employees was appointed pursuant to City policy to hear Mr. Corley's grievance. At his grievance hearing, Mr. Corley acknowledged that he had the gun at work in violation of work rules. Mr. Corley's justification for having the gun at work was that he needed it for self-defense. In the grievance process, Mr. Corley attempted to justify this rationalization by citing alleged dangerous working conditions. However, when questioned, Mr. Corley was unaware of any city employee ever having been assaulted or robbed at the Cherokee Water Treatment Plant.

Mr. Corley requested the City of Longview to provide three (3) City employees for the hearing. Kay Wilkinson, the City's Human Resources Division Manager, told Mr. Corley's attorney that it was the employee's responsibility to contact witnesses. Mr. Corley contacted these three employees and requested that they attend the hearing to testify on his behalf; however, none of them appeared at the hearing. Mr. Corley wanted these individuals to be present at the grievance hearing because he expected them to testify that they had had guns at work in violation of the work rule in question.[1] Mr. Corley testified at the hearing that he was being treated differently than other employees who had guns at work. Ron Welch, Corley's supervisor, testified that he had no knowledge of any employee, other than Corley, who had violated this rule.

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1. Each of these three people was deposed, and they all denied ever telling Mr. Corley that they had carried or had a gun at his or her place of employment with the City of Longview. Each also denied having knowledge of any City employee who had violated this rule. This deposition testimony was presented to the trial court with the City's Motion for Summary Judgment.

During the hearing, the grievance panel asked that a city employee be asked to come to the hearing. Kay Wilkinson telephoned the employee and asked for her to come to the hearing; however, she did not appear. When asked at her deposition why she did not appear at the hearing, the employee testified that she slept through the hearing because she worked the "graveyard" shift and had "pulled a double" (worked two consecutive shifts).

Following the grievance hearing, the grievance panel voted to recommend to the City Manager that Mr. Corley's termination be upheld. Subsequently, Ted Willis, the Longview City Manager at the time, upheld Mr. Corley's termination. Mr. Corley was replaced as a water treatment plant operator by a white male.

REASONS FOR DENYING THE WRIT

I.

CORLEY FAILED TO RAISE THE ISSUE OF PROTECTED EMPLOYMENT STATUS IN THE TRIAL COURT AND HAS NOT PRESERVED THIS ISSUE ON APPEAL.

Corley complains that his employment status was modified by the City of Longview's Policies. Corley did not raise this issue in his Original Complaint. Although this issue was mentioned in his response to the City's Motion for Summary Judgment, there were no pleadings on file to support those allegations, which must be affirmatively plead. FRCP 10(b) and FRCP 56(c). As a result, the trial court quite properly did not consider these issues when it granted the City's motion for summary judgment.

Simon v. United States, 891 F.2d 1154 (5th Cir. 1990). This issue cannot be the basis for an appeal of the trial court's decision. *Laird v. Shell Oil Company*, 770 F.2d 508, 511 (5th Cir. 1985), and *Portis v. First National Bank of Albany*, 34 F.3d 325, 331 (5th Cir. 1994).

II.

THE CITY OF LONGVIEW'S PERSONNEL MANUAL DOES NOT ALTER CORLEY'S EMPLOYMENT-AT-WILL STATUS.

Texas adheres to the employment-at-will doctrine that gives the employer the right to terminate an employee with or without cause unless the employee's status is altered by contract. *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991). The burden is on the employee to establish that he is covered by a contract of employment. *Southwest Airlines Co. v. J.J. Jaeger*, 867 S.W.2d 824 (Tex. App.-El Paso 1994, writ denied). While an employee handbook can become part of an employment contract and limit an employer's right to terminate an employee, it must specifically and expressly limit the employment relationship and curtail the employer's right to terminate the employee. *Whitehead v. University of Texas Health Science Center at San Antonio*, 854 S.W.2d 175 (Tex. App. — San Antonio 1993, no writ). The language cited by Mr. Corley allows termination for "just cause," but it does not restrict the City from terminating him for other reasons. Thus, this case is distinguishable from *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196 (5th Cir. 1987).

III.

JUST CAUSE EXISTED FOR TERMINATING MR. CORLEY'S EMPLOYMENT WITH THE CITY OF LONGVIEW.

Even assuming Mr. Corley's employment-at-will status was modified, his appeal is still without foundation. There is no dispute that Mr. Corley was aware of the City's rule against employees having guns at work. He intentionally violated that rule, and that was the reason given for his termination. Just cause, if required, existed for his termination, as violation of a clearly articulated, and communicated, work rule constitutes just cause for termination. In the case of *Badgett v. Northwestern Resources Co.*, 818 F. Supp. 998 (W.D. Tex. 1993), the court determined that "good cause" for termination included violation of the employer's attendance and safety policies. Similarly in *Norris v. Housing Authority of the City of Galveston*, 980 F. Supp. 885 (S.D. Tex. 1997), insubordination was held to be "good cause" warranting an employee's dismissal under an employment contract requiring good cause for termination. Because Mr. Corley willfully violated a work rule intended to make the work place safer, his termination is justified under both the *Badgett* and *Norris* decisions.

IV.

MR. CORLEY'S RIGHT TO SELF-DEFENSE DOES NOT INCLUDE THE RIGHT TO BEAR ARMS IN VIOLATION OF THE CITY'S RULES.

Mr. Corley's justification for having a gun at work was that he was concerned for his safety. Unilaterally determining that the conditions at the Cherokee Water Treatment Plant were unsafe, Mr. Corley intentionally disregarded the City's rules prohibiting employees from having guns at work. Since his discharge from City employment, Mr. Corley contends that this action violated his right to bear arms in self-defense. The irony is that the rule he violated was promulgated by the City to make Mr. Corley's workplace safe.

The Second Amendment to the United States Constitution does not provide an individual with an unlimited right to carry weapons. Indeed, the right to carry a handgun unrelated to a "well regulated militia" does not exist. *United States v. Miller*, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939). Illustrative of this rule of Constitutional interpretation is the case of *Masters v. State of Texas*, 685 S.W.2d 654 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 853, 106 S. Ct. 155, 88 L. Ed. 2d 128 (1985). In *Masters*, the Texas Court of Criminal Appeals cited long-standing authority for the position that the Second Amendment does not apply to the states or their subdivisions. *Masters* at 655. Clearly, therefore, the Second Amendment to the United States Constitution did not preclude the City of Longview from adopting its rule prohibiting employees from carrying guns on City premises.

Similarly, the Texas Constitution, Article 1, Section 23, does not preclude the City's regulation of fire arms. *Ex parte Williams*, 786 S.W.2d 781 (Tex. App. — Houston [1st Dist.] 1990), as Tex. Gov't Code Ann. § 411.203 (1997) authorizes public employers to adopt rules prohibiting persons from carrying concealed handguns on the premises of the employer.

Mr. Corley argues that the water treatment plant was under his control, thus he was entitled to have a handgun there to protect himself. The "control" did supercede the authority of its owner, and his employer, to regulate handguns on its premises. The authorities supporting the right of self-defense asserted by Mr. Corley are merely a defense to a criminal charge. TEX. PEN. CODE ANN. § 46.03(2). The privilege of carrying a gun does not exist as a "right" or "privilege" for an employee to assert to vitiate the effects of his employer's work rules.

V.

THE CITY OF LONGVIEW DID NOT DENY MR. CORLEY EQUAL PROTECTION OF THE LAW.

The City of Longview's grievance process did not deny Mr. Corley equal protection of the law. The summary judgment evidence considered by the trial court was conclusive that the City of Longview *never* subpoenaed witnesses for an employee grievance proceeding for any employee, regardless of the race or sex of the employee. Even using the strict scrutiny standard, there is no basis for Mr. Corley's proposition. Mr. Corley was treated just like every other employee, regardless of race or sex, who has filed a grievance with the City of Longview. The City's grievance process did not target a suspect class that includes Mr. Corley.

Mr. Corley's claim is that he was denied an individual right that resulted in his being treated differently. This argument does not state a claim that the process used was in violation of this equal protection rights. *Thompson v. City of Starkville*, 901 F.2d 450 (5th Cir. 1990). If anything, this argument asserts the deprivation of due process rights. However, as addressed in the next section of this brief, Mr. Corley was afforded all the due process required by law.

It is not a violation of Mr. Corley's rights to equal protection to terminate his employment for violating a precise non-discriminatory work rule, as that the City of Longview would treat any person who violated this policy exactly as it did Mr. Corley. The policy itself is not directed towards any race or sex. The City had a legitimate public safety interest in reducing the possibility of violence in the workplace. The reduction of the possibility of violence in the workplace is job-related and not based on any discriminatory animus. Mr. Corley's supervisors have never had any other person reported to them for violations of the policy in question. Thus, his race and sex are really nonissues in this analysis. For that reason, Mr. Corley's equal protection challenge must fail.

VI.

THE CITY OF LONGVIEW DID NOT DENY MR. CORLEY DUE PROCESS OF THE LAW.

When a litigant asserts a cause of action for violation of due process, it is his obligation to first identify a life, liberty, or property protected by the Fourteenth Amendment, and then identify the state action that caused the deprivation of that interest. *Blackburn v. City of Marshall*, 42 F.3d 925

(5th Cir. 1995); *See also Board of Regents v. Roth*, 408 U.S. 564 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). In this case, Mr. Corley asserts that he had a property interest in this job. Then he alleges that the procedural safeguards in his grievance hearing were inadequate in that the City refused to subpoena City employees as witnesses for him. In making these allegations, Plaintiff assumes that he had a property interest in his employment that entitled him to this protection.

Property interests in employment do not arise directly from the Constitution, but are determined from state law. *Montgomery County Hospital District v. Brown*, 965 S.W.2d 501, (Tex. 1998); *Evans v. City of Dallas*, 861 F.2d 846 (5th Cir. 1988); and *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976). Absent an agreement to the contrary, employment in Texas is at-will, terminable at any time, with or without cause. *Federal Express Corporation v. Dutschmann*, 846 S.W.2d 282 (Tex. 1993). Under Texas law, an at-will employee has no protected property interest in continued employment. *Whitehead v. University of Texas Health Science Center at San Antonio, supra. See also Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Since the protections of procedural due process apply only to a threatened deprivation of a liberty or property interest, an at-will employee with no vested interest in continued employment, such as Mr. Corley, is not entitled to those safeguards. *Spring Branch Independent School District v. Stancos*, 695 S.W.2d 556 (Tex. 1985), and *Bexar County Sheriff's Civil Service Commission v. Davis*, 802 S.W.2d 659 (Tex. 1990). Although the City of Longview extended the right to a hearing to Mr. Corley, the extension of this procedure does not of itself create a property interest in the employee's

job. *Byars v. City of Austin*, 910 S.W.2d 520 (Tex. App. — Austin 1995, writ denied). *See also Evans v. City of Dallas*, *supra*.

Assuming that Mr. Corley had some property interest in his employment, the process afforded him by the City of Longview satisfied all procedural due process requirements. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the Supreme Court determined that the essential requirements of due process are notice and an opportunity to respond at a meaningful time. 470 U.S. at 546. Amplifying on this issue in a little more detail, the San Antonio Court of Appeals stated that pretermination notice and opportunity to respond, coupled with post termination administrative proceeding are all the due process to which an employee with a constitutionally protected employment interest is entitled. *Whitehead v. University of Texas Health Science Center at San Antonio*, 867 S.W.2d at 182. The summary judgment evidence in this case revealed that Mr. Corley had ample notice of the charges against him. In fact, he admitted the truth of the charges. In addition to arguing that he had a right to violate his employee's rule, Mr. Corley challenges the process followed by the City in his appeal of the decision to terminate his employment. He argues that the process was fatally flawed because the City did not compel witnesses to attend on his behalf. As discussed below, the requirements of due process do not compel an employer to subpoena witnesses for a terminated employee.

In the case of *McDonald v. City of Corinth*, 102 F.3d 152 (5th Cir. 1996), the Court of Appeals determined that a city's failure to inform an employee that he had the right to call and cross-examine witnesses did not constitute a

violation of his civil rights. Mr. Corley was advised of these rights, and he exercised them, yet he wants to stretch the limits of due process beyond the point denied by the Court in *McDonald.*

Further illustrating the limits of due process is the Texas Supreme Court case of *Bexar County Sheriff's Civil Service Commission v. Davis*, 802 S.W.2d 659 (Tex. 1990), in which that Court held that an employee was not entitled to names of complaining witnesses against him. Relying on the *Loudermill* decision, the Texas Supreme Court reasoned:

> The notice actually provided to Davis, along with the rights granted him to confront and cross-examine the government's witnesses and *to present his own witnesses*, guaranteed that all relevant matters were adequately presented for consideration by the decision-making body.

Davis, at 663. [Emphasis added.] The Texas Supreme Court determined that Davis (the employee in that case) was given ample opportunity to present his case, including calling his own witnesses. For a similar result, *see City of Houston v. Anderson*, 841 S.W.2d 449 (Tex. App. — Houston [1st] 1992, writ denied).

The City of Longview attempted to comply with Mr. Corley's request to provide city employees as witnesses. During the hearing, Kay Wilkinson, the City's Human Resources Manager, called one of the employees and asked her to come to the hearing. She responded that she had worked double shifts and was too tired to come to the hearing. Her failure to attend the hearing does not render the process inadequate. It was the employee's choice, not

that of the City of Longview, to not go to the hearing. There is no indication that the City prevented Mr. Corley from presenting witnesses. Instead, Mr. Corley wants to impose an additional burden on his employer to bring his witnesses to the hearing for him. Due process does not impose such a burden on public employers and should not be so extended here.

Unlike many such cases, the issues raised here, although novel in some instances, are not difficult to resolve. As a City employee, Mr. Corley was obliged to follow his employer's legitimate rules. He chose not to do so. In the process that followed, the City of Longview gave Mr. Corley ample opportunity to grieve his termination. Quite naturally, in view of his obvious violation of the City's rule, Mr. Corley's discharge from the City's employment was sustained throughout the grievance process. This act alone does not demonstrate discrimination, yet this "evidence" is all that Mr. Corley presents to the Court.

CONCLUSION

For the reasons given above, the City of Longview, Texas requests the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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